No. 13,107

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellant,

vs.

LOPE M. VARLETA,

Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

Jurisdiction was invoked in the Court below by the filing of a Petition for Writ of Habeas Corpus alleging that the petitioner had been denied due process of law within the meaning of the Fifth Amendment of the Constitution and denied equal protection of the law within the meaning of the Fourteenth Amendment of the Constitution. Jurisdiction to review the decision below is conferred on this Court by 28 U.S.C. Paragraph 1291.

STATEMENT OF THE CASE.

The issues are clearly questions of law and not of fact. Therefore, the appellant and appellee have stipulated to the following facts:

Appellee was born at Pandan Antique, Philippine Islands, on September 25, 1914, and was admitted to the Hawaiian Islands for permanent residence in the year 1931, as a National of the United States. He arrived in the Continental United States March 22, 1935, and was excluded from admission to the United States on March 27, 1935, by a Board of Special Inquiry, as a stowaway. (39 Stat. 887, 8 U.S.C. 153.) Appellee was placed aboard a steamship for deportation to the Hawaiian Islands, but escaped from the vessel on April 6, 1935, and made his way into the Continental United States where he has resided since that date. The appellee has been physically present in the United States since April 6, 1935, except for his temporary absences in pursuit of his calling as a seaman aboard American vessels. The appellee last entered the United States from a foreign port on November 22, 1947, at Norfolk, Virginia, seeking admission as a resident alien seaman returning to the United States. On September 29, 1950, appellee was accorded a deportation hearing by a Hearing Examiner for the Immigration and Naturalization Service, and on November 29, 1950, a warrant for his deportation was issued charging that at the time of his last entry at Norfolk, Virginia, November 22, 1947, that the appellee was not in possession of a valid Immigration Visa and not exempted from the presentation thereof.

While in custody of the Immigration and Naturalization Service pending his deportation from the United States, appellee personally filed on January 9, 1951, a Petition for Writ of Habeas Corpus, and an Order to Show Cause was filed returnable on January 23, 1951. A continuance was granted and a Return to Order to Show Cause and a Memorandum of Points and Authorities were filed in the United States District Court, San Francisco, California, on February 6, 1951. Points and Authorities were also filed by counsel for appellee on that date, and on February 7, 1951, the matter was argued before the Honorable George B. Harris, United States District Judge in the United States District Court, San Francisco, California, and submitted.

The only questions of law to be determined in this matter were:

(1) Whether Section 8(a)(2) of the Philippine Independence Act of 1934, was nullified on July 4, 1946, by the operation of Section 14 of that Act, after Presidential Proclamation No. 2695 was signed by the President of the United States, surrendering sovereignty of the United States over the Philippine Islands;

(2) Was the effective date of the Philippine Independence Act May 1, 1934; and

(3) Was the plaintiff required by law to present an Immigration Visa upon the occasion of his return to the United States as a bona fide seaman, at Norfolk, Virginia, on November 22, 1947?

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL.

(1) That the Court erred in finding that Section 8(a)(2) of the Philippine Independence Act of 1934 is no longer effective.

(2) The Court erred in finding that the plaintiff is a lawful permanent resident of the United States.

(3) That Court erred in finding that the deportation order of the Immigration and Naturalization Service, ordering the plaintiff's return to the Philippine Islands was erroneous.

ARGUMENT.

I.

NOTWITHSTANDING PRESIDENTIAL PROCLAMATION NO. 2695 DATED JULY 4, 1946, SECTION 8(a)(2) OF THE PHILIPPINE INDEPENDENCE ACT OF MARCH 24, 1934 IS STILL IN FULL FORCE AND EFFECT.

The Philippine Independence Act of March 24, 1934 (48 Stat. 456) contains the following provisions with reference to immigration of Filipinos to the United States:

"Sec. 8(a). Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in section 17 * * *

(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13(c)), this section, and all other laws of the United States relating to the immigration, ex-

clusion, or expulsion of aliens, *citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens.* For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. This paragraph shall not apply to a person coming or seeking to come to the Territory of Hawaii who does not apply for and secure an immigration or passport visa, but such immigration shall be determined by the Department of the Interior on the basis of the needs of industries in the Territory of Hawaii.

(2) *Citizens of the Philippine Islands who are not citizens of the United States shall not be admitted to the Continental United States from the Territory of Hawaii (whether entering such Territory before or after the effective date of this section) unless they belong to a class declared to be nonimmigrants by section 3 of the Immigration Act of 1924 or to a class declared to be nonquota immigrants under the provisions of section 4 of such Act other than subdivision (c) thereof,* or unless they were admitted to such Territory under an immigration visa. The Attorney General[1] shall by regulations provide a method for such exclusion and for the admission of such excepted classes.

(3) Any Foreign Service Officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, for such period as may be necessary and under such regulations as the Secretary of State may proscribe

[1]Secretary of Labor in the original function transferred to the Attorney General by Reorganization Plan No. V, 5 F.R. 2223.

during which assignment such officer shall be considered as stationed in a foreign country; but his powers and duties shall be confined to the performance of such of the official acts and notarial and other services, which such officer might properly perform in respect of the administration of the immigration laws if assigned to a foreign country as a consular officer, as may be authorized by the Secretary of State.

(4) For the purposes of section 18 and 20 of the Immigration Act of 1917, as amended, the Philippine Islands shall be considered to be a foreign country.

(b) The provisions of this section are in addition to the provisions of the immigration laws now in force, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws not inapplicable, shall apply to and be enforced in connection with the provisions of this section. An alien, although admissible under the provisions of this section, shall not be admitted to the United States if he is excluded by any provisions of the immigrations laws other than this section and an alien although admissible under the provisions of the immigration laws other than this section, shall not be admitted to the United States if he is excluded by any provisions of this section.

(c) Terms defined in the Immigration Act of 1924, shall, when used in this section, have the meaning assigned to such terms in that Act."

"Sec. 14. Upon the final and complete withdrawal of American sovereignty over the Phil-

ippine Islands the immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries." (Emphasis supplied.)

Up to the date of the acceptance of the Philippine Independence Act by the Philippine Legislature on May 1, 1934, Filipinos as nationals of the United States were allowed unrestricted immigration into the United States and its territories.

One of the features of that legislation which occasioned considerable comment during its progress was that which dealt with the immigration of citizens of the Philippine Islands to the United States. The Act was considered in a time of great economic depression and unemployment in Continental United States was widespread. American labor interests vigorously advocated protection from the unrestricted immigration of Filipino laborers. Inasmuch as Filipinos were at that time nationals of the United States, their migration to this country was not impeded by the immigration laws. Their competition with American workers was represented as a factor which contributed to the lowering of the American standard of wages and living.[2] Some representations were made, however, that conditions in the Hawaiian Islands were such that in at least some industries the only available source of labor consisted of Filipinos, and that it would be detrimental to the economic well-

[2]House Report No. 968, 73rd Congress, 2d Session, pp. 5-12-13.

being of these Islands to restrict the immigration of such laborers.[3] There appeared to be no strenuous objection to continuing to permit the admission of Filipino laborers to Hawaii, but opposition was expressed to the further admission of citizens of the Philippines to the Continental United States, whether they were coming here from the Philippine Islands, Hawaii, or elsewhere.

A prior Act in the year 1933 was passed by the 72nd Congress of the United States over the veto of President Hoover, but was never adopted by the Philippine Legislature. The Congressional Record reflects that in discussing the prior Act, no critical comment was evoked concerning the restriction imposed by the bill upon the movement of citizens of the Philippines from Hawaii to Continental United States. In passing the Philippine Independence Act of March 24, 1934, Congress retained all of the immigration provisions adopted by the conferees for inclusion in the 1933 Act.

There has been no express repeal of Section 8(a)(2) of the Philippine Independence Act. Therefore, the question before this Honorable Court is whether Section 14 of the same Act has so effected Section 8 that its provisions are no longer applicable. It is a basic principle of law that repeals by implication are not favored, and that statutes should not be construed so as to work such a repeal, unless the intent of the legislation is clear and manifest. The

[3]Cong. Rec. Volume 76, Part I, p. 255.

United States Supreme Court in deciding the case of *United States v. Borden Company,* 308 U.S. 188, 198 (1949), stated as follows:

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States v. Tynen,* 11 Wall. 88, 92; *Henderson's Tobacco,* 11 Wall. 652, 657; *General Motors Acceptance Corp. v. United States,* 266 U.S. 49, 61, 62. The intention of the legislature to repeal 'must be clear and manifest.' Red Rock v. Henry, 106 U.S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior Act); for they may be merely affirmative, or cumulative, or auxiliary.' There must be a 'positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy.' See, also *Posados v. National City Bank,* 296 U.S. 497, 504."

As quoted supra, Section 14 of the Philippine Independence Act of March 24, 1934, provides that after independence immigration laws of the United States shall apply to persons who were born in the Philippine Islands *"to the same extent",* as in the case of other foreign countries.

The purpose of the Immigration provisions of the Philippine Independence Act was to provide Filipino labor for the industries of the Hawaiian Islands and

at the same time to prevent such laborers or other Filipinos from entering Continental United States.

The appellee contends that by the operation of Section 14 of the Act, Section 8(a)(2) is now inoperative. To accept this contention would lead to the absurd result of Congress expressly restricting the coming of Filipinos to the mainland and in the same Act providing for their unrestricted admission to the Continental United States from Hawaii after the Philippine Islands had obtained their complete independence. Such interpretation is in direct violation of the expressed intent and purposes of the Philippine Independence Act which was in form, restrictive legislation.

The Court's attention is invited to the long established rule of law that in construing a statute, the intent and purpose of the act must be considered and further where there are general and special provisions covering the same subject, the special provisions will prevail. In the case of *Rogers v. United States*, 185 U.S. 83, the United States Supreme Court stated at page 87:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not effect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to

> be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

This same Court referred on page 89 to the opinion of Mr. Justice Christiancy speaking for the Supreme Court of the State of Michigan in the case of *Crane v. Reeder,* 22 Michigan 322, 344, and quoted from that case as follows:

> "Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous as the legislature is not to be presumed to have intended a conflict."

In the case of *McCaughn v. Hershey Chocolate Company,* 283 U.S. 389 at 492, the Court stated:

> "Possible doubts as to the proper construction of the language used should be resolved in the light of its administrative and legislative history."

See also *Posadas v. National City Bank,* 296 U.S. 497 at pp. 503-504.

The United States Court of Appeals for the Eighth Circuit in the case of *United States v. Windle,* 158 Fed. (2d) 196 at p. 199 stated:

> "We recognize the rule that generally special terms of a statute prevail over general terms in the same or another statute which might otherwise control. *MacEvoy v. United States,* 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163; *Robinson v. United States,* 8 Cir. 142 Fed. 2d 431. But the purpose of this rule is to give effect to presumed intention of the law-making body. The primary rule of statutory construction requires us to ascertain and give effect to the legislative intention, *Flippin v. United States,* 8 Cir. 121 F. 2d 742; *United States v. Hartwell,* 73 U. S. 385, 18 L. Ed. 830 * * *"

The United States Court of Appeals for the Fifth Circuit in the case of *Dealer's Transport Co. v. Reese; Clark v. Same,* 138 Fed. (2d) 638 at p. 640, stated:

> "It is the duty of the court to reconcile asserted ambiguities, if possible, and to give effect to all parts of a statute so as to effectuate the intent and purpose of the Legislature."

And in the case of *United States v. Mattio, et al.,* 17 Fed. 879, this Honorable Court held that where there is an inconsistency between general and specific provisions of an Act, the specific provisions control.

The Government contends that when Congress said that the immigration laws were to apply "to the same extent", it meant that the Filipinos would no longer be in a "favored class", but would be considered as aliens. It meant among other things, that the quota for the Philippines, instead of fifty annually was to be determined as in the case of other foreign countries; that the privilege of importing laborers to

Hawaii without regard to the immigration laws was to cease; and that the Philippine Islands were to be a foreign country for all purposes under the immigration laws and not merely for the purposes set forth in Sections 8(a)(3) and 8(a)(4) of the Independence Act.

These were the ways in which during the transition period the immigration laws would *not* apply to Filipinos "to the same extent" as to other aliens, insofar as immigration to the territory of the United States was concerned. There is nothing inconsistent between Section 8(a)(2) and Section 14 insofar as they are applicable to citizens of the Philippines who wish to come to the United States from *foreign territory* after July 4, 1946. Such persons as aliens must be in possession of appropriate immigration or passport visas and once having entered Hawaii with such documents, Section 8(a)(2) does not preclude their further journey to the continent. As to such persons therefore, the immigration laws are applicable "to the same extent" as to other aliens. The same recognition was also afforded to those Filipinos who arrived in Hawaii in possession of immigration visas *prior* to July 4, 1946. It is only those citizens of the Philippines *who were restricted to the territory of Hawaii prior to July* 4, 1946 whose further movement is restricted by Section 8(a)(2). *Their movement is not more restricted now than it was when they were actually nationals of the United States.*

In view of the history and obvious purposes of the immigration provisions of the Philippine Independ-

ence Act, it is the government's contention that Sections 8(a)(2) and 14 of the Act should be read together and their terms construed in such manner as would most nearly conform to the desires and intent of the legislature and at the same time follow the rules of statutory interpretation. Thus, it follows that the only conclusion that can be reached is that Section 8(a)(2) is a special provision controlling the general provision Section 14 and is therefore still in full force and effect.

II.

APPELLEE DOES NOT HAVE A LEGAL RESIDENCE IN THE UNITED STATES.

Appellee Varleta does not have a legal residence in Continental United States and the Court below erred in its assumption that appellee was a lawful resident alien of the Hawaiian Islands. (Tr. 10.)

The question as to the effective date of the Philippine Independence Act was raised in the Court below. That Court in its written opinion found it unnecessary to pass upon this question. However, the government contends that in determining the legality of the residence of appellee, the question of the effective date must be considered.

Section 8(a) of the Philippine Independence Act (Tydings-McDuffie Act) reads:

> "Effective upon the acceptance of this Act by concurrent resolution of the Philippine *legis-*

lature or by a convention called for that purpose as provided in Section 17 * * *" (Emphasis supplied.)

Section 17 reads:

"The foregoing provisions of this Act shall not take effect until accepted by concurrent resolution of the Philippine Legislature or by a convention called for the purpose of passing upon that question as may be provided by the Philippine Legislature. (48 Stat. 456-457, 462, 465; 48 U.S.C. 1232, 1240, 1244, 1247.)"

The Act became effective on May 1, 1934, when a concurrent resolution accepting the provisions of the Act was adopted by the Senate and the House of Representatives of the Philippine Legislature in joint session. (Hackworth Digest of International Law, Volume 1, p. 486.)

This contention is further borne out in Presidential Proclamation No. 2696, July 8, 1946, 11 F.R. 7517, 60 Stat. 1353 reading in part:

"The immigration quota * * * authorized by Section 8(a)(1) of the Act approved March 24, 1934, entitled 'An Act to Provide for the Complete Independence of the Philippine Islands' * * * *which Act was accepted by concurrent resolution of the Philippine Legislature on May 1, 1934 and which became effective on that date* * * *" (Emphasis supplied.)

The question of the effective date of the Philippine Independence Act of March 24, 1934, was raised before the Honorable Court in the case of *Cabebe v.*

Acheson, 183 Fed. (2d) 795 (June 23, 1950) at which time it was stated at page 799:

> "By its terms the Act was not effective until accepted by concurrent resolution of the Philippine Legislature or by a convention called for the purpose of passing upon such question * * * As of the date of such acceptance (which occurred in fact on May 1, 1934), it was provided in Section 8(a)(1) of the Act that '(f)or the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (with an exception not pertinent here) * * *."

Appellee in his Points and Authorities filed in the Court below cited the case of *Del Guercio v. Gabot,* 161 F. (2d) 559 (1949) at page 560 in support of his contention that the effective date of the Philippine Independence Act was subsequent to May 1, 1934.

This Honorable Court's attention is invited to page 560 of the referred to case, and it will be noted that the Court refers to the acceptance of the *new Philippine Constitution* by the Philippine people, rather than the acceptance of the immigration provisions contained in the Philippine Independence Act which provided for their acceptance by concurrent resolution of the Philippine Legislature. (Section 1238, 1247, Title 48 U.S.C.A.)

Appellee, in the Court below also cited the cases of *Bradford v. Chase National Bank of City of New York,* 24 Fed. Supp. 28, 37, affirmed 105 F. (2d) 1001, affirmed 60 S. Ct. 707, 84 L. Ed. 990 and *Cincinnati Soap Co. v. United States,* 81 L. Ed. 1122, 1131,

301 U.S. 308, 319 in support of his contention that the Federal Courts have differed greatly in fixing the effective date of the Philippine Independence Act. Attention of this Honorable Court is again invited to these cases and it will note that they also refer to the acceptance of the Philippine Constitution and not to the adoption of the immigration provisions of the Philippine Independence Act.

Section 4 of the Philippine Independence Act of March 24, 1934 (48 Stat. 456) reads in part:

> "*Submission of Constitution to Filipino People.*
>
> Sec. 4. After the President of the United States has certified that the Constitution conforms with the provisions of this Act, it shall be submitted to the people of the Philippine Islands for their ratification or rejection * * * on a date to be fixed by the Philippine Legislature, at which election the qualified voters * * * shall have an opportunity to vote directly for or against the proposed Constitution * * *"

However, with regard to the immigration provisions, that same statute reads, in section 8:

> "Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature * * *"

Thus, it may be seen that while the effective date of the Philippine Constitution would be after submission to and ratification by the people, the effective date of Section 8 containing the immigration provisions, was to be upon the acceptance of the Act by

concurrent resolution of the Philippine Legislature. As stated supra, said Act was adopted by concurrent resolution of the Philippine Legislature on May 1, 1934.

It has been stipulated that prior to March 24, 1934, appellee was a national of the United States, and that his entry as a stowaway in the Hawaiian Islands in the year, 1931, was considered a lawful entry. However, as stated in its opinion (Tr. at pages 9 and 10) the Court below held that from the enactment of the Philippine Independence Act, appellee was ineligible to enter the United States without a visa.

Appellee attempted to enter the United States on March 22, 1935, after having stowed-away aboard the S.S. "Hanover". He was excluded from admission to the United States on March 27, 1935, as a stowaway by a regularly convened Board of Special Inquiry. (39 Stat. 887, 8 U.S.C. 153.) Notwithstanding said exclusion, appellee on April 6, 1935, escaped from the S.S. "Lurline" on which he had been placed for deportation to the Hawaiian Islands, and entered the Continental United States.

It is evident that appellee first stowed away on the S.S. "Hanover" for the purpose of coming to the United States. His subsequent illegal entry into the Continental United States and failure to return to Hawaii is conclusive evidence that appellee intended to remain in Continental United States, and to abandon his legal domicile in the Hawaiian Islands.

It is well settled that a legal resident may depart from Hawaii for a temporary visit and subsequently return without loss of status. However, it is equally well settled that if a resident alien departed from his legal residence without an intent to return, he abandons such legal status. The question of intent is discussed in the case of *United States ex rel. Alther et al. v. McCandless,* 46 F. (2d) 288 at p. 290 as follows:

> "In *United States ex rel. Lesto v. Day,* 21 Fed. (2d) 307, 308, the Circuit Court of Appeals for the Second Circuit said: 'Without attempting a complete definition of a "temporary visit," we may say that we think the intention of the departing immigrant must be to return within a period relatively short, fixed by some early event.' It will be noted that under this rule, the animus revertendi must exist as a positive element. A mere absence of intention to remain abroad permanently will not preserve the alien's nonquota status. The burden of proof is still with the government and must be met by the production of substantial evidence, *but if it appear that he left with no definite intention, either of staying permanently or of returning, merely planning to let future events determine his course, his stay would not be a temporary visit and the statute would automatically place him in the quota class.*" (Emphasis supplied.)

From the facts in the case at bar, it cannot be said that appellee has continued to maintain a lawful residence in the Islands of Hawaii. However, even if we were to concede that he maintained a residence in Hawaii from and after May 1, 1934, he was not

eligible to come to the Continental United States and could acquire no lawful residence therein.

Specifically referring to Section 8(a)(1) and 8(a)(2), which have been quoted in their entirety, supra, pertinent portions of those sections are again quoted:

8(a)(1):

"For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 * * * citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens."

8(a)(2):

"Citizens of the Philippine Islands * * * shall not be admitted to the Continental United States from the territory of Hawaii * * * unless they belong to a class declared to be nonimmigrants by Section 3 of the Immigration Act of 1924, or to a class declared to be nonquota immigrants, under the provisions of Section 4 of such Act * * *"

Section 1 of the Immigration Act of February 5, 1917 (39 Stat. 874, 8 U.S.C. 173), reads in part:

"* * * *but if any alien shall leave the Canal Zone, or any insular possession of the United States, and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens.*" (Emphasis supplied.)

Section 3 of the Immigration Act of February 5, 1917, reads in part:

> "That the following classes of aliens shall be excluded from admission into the United States * * * stowaways * * *."

Section 3 of the Immigration Act of 1924 (43 Stat. 154, 47 Stat. 607, 54 Stat. 711, Section 7(c), 59 Stat. 672; 8 U.S.C. 203) enumerates aliens who may be classified as nonimmigrants. Section 4 of that same Act (43 Stat. 155, 44 Stat. 812, 45 Stat. 1009, 46 Stat. 854, 47 Stat. 656, 8 U.S.C. 204) classifies those aliens considered to be nonquota immigrants.

III.

APPELLEE IS ILLEGALLY WITHIN THE UNITED STATES AND IS DEPORTABLE TO THE PHILIPPINE ISLANDS.

From the facts in the case at bar, it is apparent that the appellee at time of his entry in 1935, was excludable under the provisions of the Immigration Act of 1917 and did not fall within any of the categories enumerated in Sections 3 and 4 of the Immigration Act of 1924. He was, therefore, properly excluded by the aforesaid Board of Special Inquiry on March 27, 1935. Further, at the time of his surreptitious entry into Continental United States on April 6, 1935, he was not in possession of a visa which would have placed him in a class declared to be a nonquota immigrant under Section 4 of the Immigration Act of 1924, and he would, therefore be

deportable as an alien who at the time of his entry in 1935 was not in possession of an immigration visa.

While appellee had remained in the United States from April 6, 1935, to some date in 1945, at which time he took up the pursuit of a seaman, it cannot be said, as indicated above, that appellee ever had a legal permanent residence in Continental United States. The legality of an alien's entry into the United States can never be based on a former illegal entry. *Del Castillo v. Carr,* C.C.A. Cal. 1938, 100 F. (2d) 338. In the absence of facts showing that the departure of an alien from the United States was not voluntary, every entry into the United States by an alien from a foreign port constitutes a new entry into the United States within the intent and meaning of the immigration laws.

Delgadillo v. Carmichael, 332 U.S. 388, 68 S. Ct. 10;

Carmichael v. Delaney, 170 F. (2d) 239;

United States ex rel. Clausen v. Day, 279 U.S. 398.

Thus, at the time of appellee's last entry into the United States from a foreign port at Norfolk, Virginia, on November 22, 1947, he was at that time attempting to return to a claimed residence and as such should have been in possession of the proper immigration documents as required under Section 4 of the Immigration Act of 1924. Having no legal residence in the United States, he was ineligible for the benefits of the regulation contained in 8 C.F.R.

175.45(b)[4] and his entry from "a place outside the United States" in 1947 *was* in violation of the aforesaid Immigration Act of 1924. Therefore, the charge contained in the Immigration warrant of arrest that the appellee was not in possession of a valid immigration visa is substantiated as is the warrant of deportation ordering appellee's deportation to the Philippine Islands, dated November 29, 1950.

The Court below in its opinion (Footnote T.R. 10) stated that persons in appellee's category have actually been admitted to citizenship in the District Court. However, it is desired to emphasize that in the cases of those persons, there was a record of their entry into the Continental United States pursuant to the provisions of Section 8(a)(2) of the Philippine Independence Act. In addition, the Court's attention is invited to the fact that the statutes covering naturalization are separate and apart from those statutes regulating immigration. This difference was recognized by the Court in *Application of Viloria,* 84 F. Supp. 587:

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[4]Section 174.45 Code of Federal Regulations:

IMMIGRANTS REQUIRED TO PRESENT PASSPORTS BUT NOT PERMITS TO ENTER.

Aliens who are lawful permanent residents of the United States, and who fall within the following categories are exempt from the requirements of presenting permits to enter, inasmuch as the requirement thereof is waived, but must present passports;

(a) * * *

(b) An alien, occupationally a seaman, who is returning in accordance with the terms of the articles of outward voyage, or the terms of his discharge before a consular officer of the United States.

"In dealing with naturalization matters, differing greatly from immigration * * *"

In any event, the question of what rights appellee may have under naturalization laws are not before the Court in this action.

CONCLUSION.

It is respectfully submitted, therefore, that the order of the Court below be reversed and that appellee be remanded to the custody of the Immigration and Naturalization Service.

Dated, San Francisco, California,
November 19, 1951.

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